

his compensation represents commissions. The same will be true of an employee receiving both salary and commission payments whose commissions always exceed the salary. If, on the other hand, the commissions paid to an employee receiving a salary are always a minor part of his total compensation it is clear that he will not qualify for the exemption provided by section 7(i).

§ 779.416 What compensation “represents commissions.”

(a) Employment arrangements which provide for a commission on goods or services to be paid to an employee of a retail or service establishment may also provide, as indicated in § 779.413, for the payment to the employee at a regular pay period of a fixed sum of money, which may bear a more or less fixed relationship to the commission earnings which could be expected, on the basis of experience, for an average period of the same length. Such periodic payments, which are variously described in retail or service establishments as “advances,” “draws,” or “guarantees,” are keyed to a time base and are usually paid at weekly or other fixed intervals which may in some instances be different from and more frequent than, the intervals for payment of any earnings computed exclusively on a commission basis. They are normally smaller in amount than the commission earnings expected for such a period and if they prove to be greater, a deduction of the excess amount from commission earnings for a subsequent period, if otherwise lawful, may or may not be customary under the employment arrangement. A determination of whether or to what extent such periodic payments can be considered to represent commissions may be required in those situations where the employment arrangement is that the employee will be paid the stipulated sum, or the commission earnings allocable to the same period, whichever is the greater amount. The stipulated sum can never represent commissions, of course, if it is actually paid as a salary. If, however, it appears from all the facts and circumstances of the employment that the stipulated sum is not so paid and that it actually functions as an integral part of a true commission

basis of payment, then such compensation may qualify as compensation which “represents commissions on goods or services” within the meaning of clause (2) of the section 7(i) exemption.

(b) The express statutory language of section 7(i), as amended in 1966, provides that “In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee” which may be paid to the employee. Thus an employee who is paid a guarantee or draw against commissions computed in accordance with a bona fide commission payment plan or formula under which the computed commissions vary in accordance with the employee’s performance on the job will qualify for exemption provided the conditions of 7(i)(1) are met as explained in § 779.419. Under a bona fide commission plan all of the computed commissions will be counted as compensation representing commissions even though the amount of commissions may not equal or exceed the guarantee or draw in some workweeks. The exemption will also apply in the case of an employee who is paid a fixed salary plus an additional amount of earned commissions if the amount of commission payments exceeds the total amount of salary payments for the representative period.

(c) A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek (as would be the case where the computed commissions seldom or never equal or exceed the amount of the draw or guarantee). Another example of a commission plan which would not be considered as bona fide is one in which the employee receives a regular payment constituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be

expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.

§ 779.417 The “representative period” for testing employee’s compensation.

(a) Whether compensation representing commissions constitutes most of an employee’s pay, so as to satisfy the exemption condition contained in clause (2) or section 7(i), must be determined by testing the employee’s compensation for a “representative period” of not less than 1 month. The Act does not define a representative period, but plainly contemplates a period which can reasonably be accepted by the employer, the employee, and disinterested persons as being truly representative of the compensation aspects of the employee’s employment on which this exemption test depends. A representative period within the meaning of this exemption may be described generally as a period which typifies the total characteristics of an employee’s earning pattern in his current employment situation, with respect to the fluctuations of the proportion of his commission earnings to his total compensation.

(b) To this end the period must be as recent a period, of sufficient length (see paragraph (c) of this section) to fully and fairly reflect all such factors, as can practicably be used. Thus, as a general rule, if a month is long enough to reflect the necessary factors, the most recent month for which necessary computations can be made prior to the payday for the first workweek in the current month should be chosen. Similarly, if it is necessary to use a period as long as a calendar or fiscal quarter year to fully represent such factors, the quarterly period used should ordinarily be the one ending immediately prior to the quarter in which the current workweek falls. If a period longer than a quarter year is required in order to include all the factors necessary to make it fully and fairly representative of the current period of employment for purposes of section 7(i), the end of such period should likewise be at least as recent as the end of the quarter year immediately preceding the quarter in

which the current workweek falls. Thus, in the case of a representative period of 6 months or of 1 year, recomputation each quarter would be required so as to include in it the most recent two quarter-years or four quarter-years, as the case may be. The quarterly recomputation would tend to insure that the period used reflects any gradual changes in the characteristics of the employment which could be important in determining the ratio between compensation representing commissions and other compensation in the current employment situation of the employee.

(c) The representative period for determining whether more than half of an employee’s compensation represents commissions cannot, under the express terms of section 7(i), be less than 1 month. The period chosen should be long enough to stabilize the measure of the balance between the portions of the employee’s compensation which respectively represent commissions and other earnings, against purely seasonal or plainly temporary changes. Although the Act sets no upper limit on the length of the period, the statutory intent would not appear to be served by any recognition of a period in excess of 1 year as representative for purposes of this exemption. There would seem to be no employment situation in a retail or service establishment in which a period longer than a year would be needed to represent the seasonal and other fluctuations in commission compensation.

(d) Accordingly, for each employee whose exemption is to be tested in any workweek under clause (2) of section 7(i), an appropriate representative period or a formula for establishing such a period must be chosen and must be designated and substantiated in the employer’s records (see § 516.16 of this chapter). When the facts change so that the designated period or the period established by the designated formula is no longer representative, a new representative period or formula therefor must be adopted which is appropriate and sufficient for the purpose, and designated and substantiated in the employer’s records. Although the period selected and designated must be